FOR ARGUMENT

No. 75-661

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

GABRIEL FRANCIS ANTELOPE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Respondents contend that the statutory scheme embraced by 18 U.S.C. 1152 and 1153 rests upon a racial classification, that accordingly it must be subjected to the closest possible scrutiny under equal protection standards, and that under such scrutiny no compelling governmental interest exists to justify the assertion of federal jurisdiction over crimes involving Indians but not those purely between non-Indians. They also contend that the term "Indian" contained in 18 U.S.C. 1153 is unconstitutionally vague. These claims do not withstand analysis.

1. Undeniably, 18 U.S.C. 1153 rests to some extent upon a racial classification: whether a person is racially an Indian is an important factor in determining whether he is an Indian within the meaning of the Major Crimes Act and for other aspects of federal trust responsibility. But as we have shown (Br. 33-36), it is only one factor. Equally important is whether a person is a member of a governmental body, a

federally recognized Indian tribe, towards which the government exercises a trust responsibility.[1] In any event, the category of Indian, for federal jurisdictional purposes, is

[1]In arguing that 18 U.S.C. 1152 and 1153 classify Indians "by quantum of blood and race, thereby creating a suspect classification" (Antelope Br. 4), respondents rely in particular upon the early case of *United States* v. *Rogers*, 4 How. 567, in which this Court held that a murder committed by one white man against another in the United States territory allotted to the Cherokee Indians was triable in federal court under an early version of 18 U.S.C. 1152, despite claims that the accused and the victim "at mature age" (*id.* at 572) had been "adopted" into the tribe. See also *Alberty* v. *United States*, 162 U.S. 499. But neither *Rogers* nor *Alberty* stands for the proposition that "blood and race" are determinative of the question whether a person is an Indian or not. *Rogers* itself, as the Indian authority Felix Cohen has noted, established a "test * * * to the effect that an individual to be considered an Indian must not only have some degree of Indian blood *but must in addition be recognized* as an Indian. In determining such recognition the courts have heeded both recognition by the tribe or society of Indians and recognition by the Federal Government as expressed in treaty or statute." *Handbook of Federal Indian Law* 3 (1942 ed.; emphasis added). This point is illustrated by the fact, as noted in our opening brief (pp. 35-36), that federal Indian jurisdiction does not extend to racial Indians who have severed their ties to the tribe or to tribes that have been "emancipated from federal guardianship and control." *United States* v. *Mazurie*, 419 U.S. 544, 554 n. 11.

Moreover, even assuming that the Court in *Rogers* regarded "Indian" as a term descriptive primarily of race, the historical reasons for that emphasis (for example, the problem of outlaws escaping federal jurisdiction by the expediency of obtaining adoption into an Indian tribe, see 4 How. at 573) are not present with equal force today, and there is ample support in the Court's subsequent decisions for Professor Cohen's view "that in dealing with Indians the Federal Government is dealing primarily not with a particular race as such but with members of certain social-political groups toward which the Federal Government has assumed special responsibilities." Cohen, *supra*, at 5. Certainly the Court need not today adopt or adhere to a "racial" definition of the term "Indian" in federal criminal jurisdictional statutes if the consequence of such a construction is to render the statutes unconstitutional in operation and seriously to impede law enforcement in Indian country.

not a suspect category. As this Court held in *Morton* v. *Mancari*, 417 U.S. 535, 551-553:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, §8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, §2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. ***
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> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n. 13 (ED Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

Moreover, a claim of denial of equal protection requires a showing not merely that there has been a disparity of treatment but that the disparate treatment is invidious, and this Court has recently affirmed "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis*, 426 U.S. 229, 240. See *Village of*

Arlington Heights v. *Metropolitan Housing Development Corp.*, No. 75-616, decided January 11, 1977, slip op. 11-15. The Court has also recently emphasized, in dealing with legislation affecting aliens, that the fact that Congress has treated members of a group over which it has plenary power differently from other persons "does not in itself imply that such disparate treatment is 'invidious.'" *Mathews* v. *Diaz*, 426 U.S. 67, 80.

The disparity of treatment of which respondents complain is not invidious. As we pointed out in our opening brief (pp. 13-15), federal law treats equally anyone committing murder, regardless of race (or status as an Indian), within federal jurisdiction. The disparate treatment complained of by respondents arises only through a comparison with law from another jurisdiction, and then only by reference to the single class of cases in which both the perpetrator and victim of a crime in Indian country are non-Indian. The resulting differences in treatment do not stem from a purpose to discriminate against (or, for that matter, in favor of) Indian defendants, but from a recognition by the Congress and this Court that when neither the perpetrator nor the victim of a crime in Indian country is Indian, the federal trust responsibility over the Indian tribes is not implicated and federal jurisdiction may properly yield to the State's basic interest in the uniform application of its laws to its citizens. *United States* v. *McBratney*, 104 U.S. 621, and cases cited at p. 17 of our opening brief. Furthermore, in such a case no affirmative "treatment" of Indians by Congress comes into play, but merely a decision to leave prosecution of the non-Indian to state authorities under state procedural and substantive rules that inevitably will differ in some respects from federal law. Even if this statutory scheme rests ultimately upon a racial classification, therefore, its effect or purpose cannot be characterized as invidious.[2] Indeed, as we discussed at length in our opening brief, this Court has repeatedly endorsed the jurisdictional limitation on the scope of 18 U.S.C. 1152 without so much as suggesting that it might operate to deny an individual Indian defendant the equal protection of the law.

In challenging the jurisdictional allocation contained in 18 U.S.C. 1152 and 1153, as interpreted by this Court, respondents mount a broad attack on the continuing validity of the federal wardship doctrine, asserting that it may be sufficient as a basis for "benign" legislation intended to help Indians but that it provides no rationale for permitting Indian criminal defendants to be tried at a procedural or substantive disadvantage compared to their non-Indian counterparts in state court (Antelope Br. 23-27; Davison Br. 12-13, 17-18). The Davison respondents argue, indeed, that Congress has recognized the obsolescence of the wardship concept by its decision in 1953 giving five States complete criminal and civil jurisdiction over most reservations within their boundaries, and consenting to the

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[2]This case does not require the Court to grapple with the considerably more difficult question presented by cases such as *United States* v. *Cleveland*, 503 F. 2d 1067 (C.A. 9), which was invoked by the court of appeals to support its decision in the instant case, and upon which respondents rely (Antelope Br. 26-29; Davison Br. 21-23). There is, as we pointed out in our opening brief (pp. 31-33), a critical distinction between the instant case and the *Cleveland* line of cases—in the latter, the courts were confronted with federal legislation affirmatively providing for different substantive standards and punishment provisions, depending upon the status of the defendant as Indian or non-Indian, although both classes of defendants would be tried in federal court. The cases thus involved an affirmative legislative discrimination based solely upon the status of the defendant. This discrimination was a product of legislative oversight and served no discernible purpose (it has now been rectified by amendment of Section 1153 (Indian Crimes Act of May 29, 1976, Pub. L. 92-297, 90 Stat. 585). Respondents' arguments entirely overlook these critical distinctions.

assumption of such jurisdiction by any other State. Pub. L. 280, Act of August 15, 1953, ch. 505, Sections 2, 7, 67 Stat. 588, 590.

Respondents' deprecation of the wardship doctrine, however, is contradicted by an unbroken line of this Court's decisions reaffirming the responsibility of the federal government both to foster Indian self-government and at the same time to assume a limited role in the regulation of the conduct of individual Indians for the protection of the tribes and of society at large. That responsibility is not diminished by the fact that Congress has concluded that in certain geographical areas or with respect to a particular class of conduct (crimes entirely between non-Indians), the necessity for exercising its trust responsibility does not exist. Although the federal power over the Indian tribes is plenary, Congress may—as with its similar power over other matters—make reasonable judgments regarding the extent to which the power should be exercised in particular kinds of cases. Indeed, as this Court's decisions make clear, the decision how far to assert federal jurisdiction in Indian country is a particularly difficult one because it affects not only federal interests and the residual sovereignty of the tribes but important state interests as well.

Pub. L. 280, as amended, does not, as the Davison respondents argue, show the arbitrariness of the scheme of federal criminal jurisdiction in Indian country; instead, it illustrates Congress' concern to achieve a proper balance between the oft-divergent interests of the different sovereigns in this field. As originally enacted, the law conferred upon five States all civil and criminal jurisdiction in Indian country except as to certain tribes that had "a tribal law and order organization functioning in a reasonably satisfactory manner" and that had opposed the transfer of jurisdiction. H.R. Rep. No. 848, 83d Cong., 1st Sess. 6 (1953). Section 7 of the law also gave Congressional approval to similar as-

sumption of jurisdiction by any other State without requiring tribal consent, although Congress emphasized that "the attitude of * * * the Indian groups within those States on the jurisdiction transfer question should be heavily weighed before effecting transfer * * * " (*ibid.*). In the ensuing years, tribes criticized this provision for transfer of jurisdiction without their consent "and regardless of their needs or special circumstances." S. Rep. No. 721, 90th Cong., 1st Sess. 32 (1967). In the Indian Civil Rights Act of 1968, 82 Stat. 77 *et seq.* (25 U.S.C. 1301 *et seq.*), therefore, Congress amended Section 7 of Pub. L. 280 to require tribal consent to such transfers in the future (25 U.S.C. 1321). The Act also authorized the federal government to accept retrocession by any State of all or partial criminal or civil jurisdiction previously acquired under Pub. L. 280 (25 U.S.C. 1323).

Thus Pub. L. 280, as amended, provides for the withdrawal (or resumption) of federal jurisdiction over crimes by or against Indians in a manner fully consistent with Congress' trust responsibility to the Indian tribes. Insofar as it permits complete state jurisdiction in Indian country with the consent of the tribes affected, it accords logically with Congress' long-standing decision (embodied in 18 U.S.C. 1152 and 1153) to exercise its authority over those crimes that affect "essential tribal relations" (*Williams* v. *Lee*, 358 U.S. 217, 219-220) but to leave to state prosecution crimes on the reservations that do not personally involve Indians.

18 U.S.C. 1152 and 1153, as interpreted by this Court (and as modified by Pub. L. 280), represent a reasonable and, on the whole, historically successful balance of the interests of the tribes and the federal and state sovereignties in Indian country. Respondents' equal protection argument, if accepted, would destroy this balance without any predictable benefit to the tribes or to their individual members. Presumably, as we explained in our brief (pp. 42-45), the disparate treatment of which respondents complain

could be eliminated by a construction of Section 1152 overriding the States' historic interests and divesting them of all criminal jurisdiction in Indian country (although the Davison respondents apparently still would argue that they were denied equal protection by comparison to a hypothetical Indian defendant tried under arguably more lenient circumstances in a State covered by Pub. L. 280). Absent such a construction, however, the "equality" of treatment that respondents demand can be accomplished only by the surrender of federal supremacy in the exercise of its trusteeship and the complicated comparison of federal and state law in search of leniency illustrated in our brief (pp. 36-42). We submit that an Indian defendant may properly be tried under federal law without resort to either of these extreme interpretations of the federal statutory scheme.

2. Respondents contend that Section 1153 is unconstitutionally vague because of the discretion it purportedly gives to prosecutors to decide who is an "Indian" for purposes of criminal prosecution. We do not believe that vagueness as to a jurisdictional consideration unrelated to the definition of the elements of an offense could ever present a constitutional problem—the matter would simply require clarifying judicial construction. In any event, respondents, all of whom are enrolled tribal Indians, do not deny that their conduct was clearly unlawful under both state and federal statutes (Antelope Br. 38).[4] And it is settled that "vagueness challenges to statutes which do not involve First Amendment freedoms"—as 18 U.S.C. 1153

[4]The Davison respondents contend only generically that Section 1153 "does not give sufficient notice to citizens of the United States"; they do not suggest that they are within the specific class of those who have emancipated themselves from tribal membership but "may still be regarded [by a prosecutor] as an Indian because of [their] physical racial characteristics" (Davison Br. 25).

assuredly does not—"must be examined in the light of the facts of the case at hand." *United States* v. *Powell*, 423 U.S. 87, 92, quoting *United States* v. *Mazurie*, 419 U.S. 544, 550; *Crowell* v. *Benson*, 285 U.S. 22, 62. Respondents thus cannot avoid the application of 18 U.S.C. 1153 to their conduct by the claim that it might be unconstitutionally vague as applied to others. See *Parker* v. *Levy*, 417 U.S. 733, 756.

For these reasons, in addition to the reasons set out in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

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